OAH Docket No. 11-2000-21160-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal of Public Waters Permit No. 2010-0117 Issued to MnDOT for Structural Load Testing

ORDER ON MOTION IN LIMINE

This matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice and Order for Prehearing Conference and Order for Hearing issued on February 26, 2010. On June 25, 2010, the Minnesota Department of Transportation (MnDOT) filed a Motion in Limine and supporting Memorandum. On July 8, 2010, David Beaudet, Mayor of the City of Oak Park Heights, filed a response to the motion. By letter dated July 29, 2010, the Administrative Law Judge requested additional briefs on the burden of proof issue. Additional letter briefs were submitted by the Department of Natural Resources (MnDNR) on August 4, 2010, Mayor Beaudet on August 6, 2010, and MnDOT on August 10, 2010. The OAH record relating to the motion record closed on August 10, 2010.

Patrick Whiting, Assistant Attorney General, appeared on behalf of MnDOT.

David P. Iverson and Jill Schlick Nguyen, Assistant Attorneys General, appeared on behalf of MnDNR.

Mayor David Beaudet appeared on his own behalf, without counsel.

Based on all of the files and proceedings herein, and for the reasons discussed in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

MnDOT's Motion in Limine is GRANTED in part and DENIED in part, as follows:

1. MnDOT's request for a ruling that Mayor Beaudet bears the burden of proof in this proceeding is DENIED. Pursuant to Minn. Stat. § 103G.315, subd. 6, MnDOT, as the permit applicant, bears the overall burden of showing by a preponderance of the evidence that its permit application is "reasonable, practical, and will adequately protect public safety and promote the public welfare." To facilitate the orderly production of evidence at the hearing, MnDOT shall bear the initial burden of producing evidence to support a *prima facie* case that its application meets the standards set forth in Minn. Stat. § 103G.315, subd. 6. Thereafter, the burden of production will shift to Mayor Beaudet to show that the permit application fails to meet those standards or is contrary to Minnesota statutes or rules in some particular respect.

Despite this shifting burden of production, the overall burden of proving that the permit application complies with applicable law and rule shall remain with MnDOT.

2. Absent a specific showing of relevance to the permit at issue in this case, MnDOT's motion to exclude evidence relating to other permit applications made to MnDNR and MnDNR's approval or rejection of those applications is GRANTED.

3. Because evidence relating to prior applications or permits by MnDOT to conduct testing in the St. Croix River is relevant to the issues set forth in the current case, MnDOT's Motion in Limine regarding this evidence is DENIED. However, absent a specific showing of relevance to the permit at issue in this case, the Motion in Limine is GRANTED as to MnDOT applications or permits to conduct testing in areas other than the St. Croix River.

Dated: August 10, 2010

s/Barbara L. Neilson

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BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Background

During 2009, MnDOT applied to MnDNR for a public waters permit to perform structural load testing at a proposed bridge site over Lake St. Croix, a natural impoundment of the St. Croix River. On January 22, 2010, MnDNR issued Public Waters Work Permit No. 2010-0117 to MnDOT. The permit allowed MnDOT to conduct a structural load test by drilling a shaft up to eight feet in diameter to a depth of 170 feet, filling the shaft with concrete, and later removing the shaft to two feet below the river bottom.[1]

By letter dated February 8, 2010, David Beaudet, Mayor of the City of Oak Park Heights, submitted a letter to MnDNR objecting to the issuance of the permit and demanding a contested case hearing under Minn. Stat. § 103G.311, subd. 5.[2] In his letter, Mayor Beaudet alleged that the permit lacked necessary conditions to protect the St. Croix River and asserted that the MnDNR had waived the requirement to protect fishing resources with "little rationale or explanation," contrary to its approach in another situation involving placement of a diversion pipe from Perro Creek to the St. Croix River. He also contended that MnDNR failed to provide the City of Oak Park Heights with an opportunity to provide comments concerning the permit within the time period specified

[1] Affidavit of Patrick Whiting, Ex. A.

[2] Affidavit of Patrick Whiting, Ex. B. Pursuant to Minn. Stat. § 103G.311, subd. 5, if the Commissioner of the MnDNR waives a hearing on a permit application and orders the permit to be issued or denied, certain parties (including the mayor of the municipality in which the proposed activity for which the permit is requested is located) may demand a contested case hearing on the application.

in Minn. Stat. § 15.99 and improperly issued the permit without incorporating the comments of the City of Oak Park Heights.[3]

In response to Mayor Beaudet's hearing demand, MnDNR notified MnDOT by letter dated February 11, 2010, that Permit No. 2010-0117 was terminated.[4] This contested case proceeding was subsequently initiated. The hearing is scheduled to begin on August 11, 2010.

On June 25, 2010, MnDOT filed a Motion in Limine in this matter. In its motion, MnDOT requested that the Administrative Law Judge issue an order establishing that Mayor Beaudet bears the burden of proof at the contested case hearing. MnDOT further requested that the Administrative Law Judge issue an order excluding certain evidence that MnDOT expects Mayor Beaudet to offer during the hearing. Specifically, MnDOT urged that Mayor Beaudet not be allowed to introduce evidence relating to other permit applications submitted to MnDNR by MnDOT or others and whether MnDNR approved or rejected those applications. MnDOT further requested that the Administrative Law Judge preclude evidence relating to past testing by MnDOT in the St. Croix River or anywhere else.

On July 8, 2010, Mayor Beaudet submitted a letter in response to the motion. In his response, Mayor Beaudet asserted that it is necessary to review all previous permit application materials to determine if the requirements of Minn. Rules part 6115.0240, subp. 3(C)(2)-(4), have been satisfied. That rule provision specifies that an application is complete when, among other things, "it includes a brief statement regarding the following points: . . . (2) unavoidable anticipated detrimental effects on the natural environment; (3) alternatives to the proposed action; [and] (4) that the proposed project is reasonable and practical and will adequately protect public safety and promote the public welfare . . . ."

In his July 8 response, Mayor Beaudet further contended that MnDNR afforded special treatment to MnDOT in connection with the permit application, apparently because MnDNR provided the City of Oak Park Heights and others with copies of the permit application filed by MnDOT rather than requiring MnDOT itself to serve copies of its application. Mayor Beaudet argues that this process violated Minn. Stat. § 301G.301 [sic] and Minn. Rules part 6115.0240.[5] It appears that the statutory provision to which the Mayor intended to refer is Minn. Stat. § 103G.301, which states in subdivision 6:

> (a) An application for a permit must be filed with the commissioner and if the proposed activity for which the permit is requested is within a municipality . . . a copy of the application with maps, plans, and specifications must be served on the mayor of the municipality . . . .

[3] *Id*.
[4] Affidavit of Patrick Whiting, Ex. C.
[5] Mayor Beaudet's July 8, 2010, response at 2.

> (b) If the application is required to be served on a local governmental unit under this subdivision, proof of service must be included with the application and filed with the commissioner.

Similarly, Minn. Rules part 6115.0240, subp. 3(E), states that an application is complete when, among other things, "proof of service of a copy of the application and accompanying documents on the mayor of the city or the secretary of the board of the district is included with the application if the project is within or affects a city, watershed district, or soil and water conservation district."

By letter dated July 29, 2010, the Administrative Law Judge requested further briefing on the burden of proof issue. In his response dated August 6, 2010, Mayor Beaudet argued that, in accordance with Minn. Stat. § 103G.315, subd. 6, MnDOT should bear the burden of proof in this proceeding. In its August 4 submission, MnDNR suggested that the burden initially be placed on MnDOT to establish a *prima facie* case that its permit application is reasonable, practical, and will adequately protect public safety and promote the public welfare under Minn. Stat. § 103G.315, subd. 6(a), and that the burden thereafter shift to Mayor Beaudet to demonstrate that MnDOT's permit application is not consistent with Minnesota law. In its August 10, 2010, letter brief, MnDOT agreed with the approach suggested by MnDNR.

Each of the issues raised in MnDOT's Motion in Limine will be addressed below.

Burden of Proof

In this proceeding, Mayor Beaudet filed a demand for a hearing on MnDOT's application for a public waters permit after it was issued by the MnDNR. Chapter 103G.311, subd. 1, specifies that such hearings must be conducted as a contested case hearing under Chapter 14 of the Minnesota Statutes.

In its Motion in Limine, MnDOT initially contended that one of the OAH rules applicable to contested case proceedings (Minn. Rules part 1400.7300, subpart 5) required that the burden of proof in this matter be borne by Mayor Beaudet. That rule states:

> The party proposing that certain action be taken must prove the facts at issue by a preponderance of evidence, unless the substantive law provides a different burden or standard. A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence. In employee disciplinary actions, the agency or political subdivision initiating the disciplinary action shall have the burden of proof.

In the initial Memorandum in support of its motion, MnDOT pointed out that the Minnesota Court of Appeals and another Administrative Law Judge[6] had applied the

[6] *Minnesota Center for Environmental Advocacy v. Commissioner of Minnesota Pollution Control Agency*, 696 N.W.2d 398 (Minn. App. 2005); ALJ's Order on Motion in Limine in *In the Matter of the Saint Cloud*

OAH general rule to place the burden of proof on a third-party who challenged a permit issued by the Minnesota Pollution Control Agency (MPCA), and asserted that the same result should be reached in the current case. However, in its August 10, 2010, supplemental submission regarding the motion, MnDOT acknowledged that, in light of the explicit statement in Minn. Stat. § 103G.315, subd. 6, regarding the burden of proof, MnDOT "cannot make a good faith argument that substantive law does not provide a different burden than the general rule regarding the burden of proof," and joined MnDNR in suggesting that a shifting burden of production approach be followed in this case.

In considering the proper allocation of the burden of proof in this proceeding, it is helpful to examine the nature of the issue raised in this proceeding and the relevant statutes and rules. The Notice and Order for Hearing initiating this contested case hearing states that the issue for the hearing is "[w]hether the proposed structural load testing in Lake St. Croix is consistent with the applicable Minnesota statutes and Minnesota rules . . . supporting issuance of a public waters permit." Minn. Stat. § 103G.311, subd. 5, authorizes a mayor to file a demand for hearing "on the application" and states that the Commissioner of the Department of Natural Resources thereafter must hold a hearing "and make a determination on issuing or denying the permit as though the previous order [issuing or denying the permit] had not been made." After the hearing demand was received, MnDNR informed MnDOT that the permit that had previously been issued by MnDNR to MnDOT was "terminated."[7] Finally, and most importantly, Minn. Stat. § 103G.315, subd. 6, specifies that, "[i]n permit applications, the applicant has the burden of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare."

Unlike the MPCA statutes involved in the *MCEA v. MPCA* case, the substantive law applicable to this proceeding explicitly states that the burden of proof is on the applicant for a MnDNR public waters permit and requires that there be a *de novo* consideration of whether the permit application should be granted or denied.

Wastewater Treatment Plant NPDES Permit, OAH Docket No. 7-2200-14439-2 (Dec. 17, 2003) (attached as Exhibit D to MnDOT's Motion in Limine). In that case, the MPCA made an original preliminary determination that a wastewater treatment permit sought by the City of St. Cloud would be renewed without imposing a one milligram per liter limit on the City's phosphorus discharge. The Minnesota Center for Environmental Advocacy (MCEA) challenged the agency's approval of the permit on the grounds that the agency improperly applied a rule relating to phosphorus removal and applied too narrow a test to determine whether allowing the treatment plant would affect a reservoir. The Administrative Law Judge presiding in that case ultimately recommended that the permit be issued, and the Minnesota Pollution Control Agency adopted the ALJ's recommendation with minor alterations. On appeal, the MCEA alleged that the Administrative Law Judge and the agency had improperly placed the burden of proof on those opposing the permit rather than on the applicant. The Court of Appeals affirmed the determination of the Administrative Law Judge and the agency that the burden of proof should be placed on the MCEA rather than the City of St. Cloud. After discussing Minn. Rules part 1400.7300, subp. 5 (quoted above), the Court indicated that, "[b]ecause it is [the MCEA] rather than the city or the agency that is seeking to have the [phosphorus] limit added to the permit, and because it is the imposition of that limit that is at issue in these proceedings, under Minn. R. 1400.7300, subp. 5, [the MCEA] is the party proposing action and has the burden of proof."

[7] *See* Letter from Molly Shodeen to MnDOT dated Feb. 11, 2010, attached as Exhibit C to the Affidavit of Patrick Whiting.

Accordingly, the general OAH rule as to burden of proof and the rationale of the *MCEA v. MPCA* case do not apply here.

Accordingly, the Administrative Law Judge concludes that MnDOT's request for a ruling that Mayor Beaudet bears the burden of proof in this proceeding must be denied. In accordance with Minn. Stat. § 103G.315, subd. 6, MnDOT, as the permit applicant, shall bear the overall burden of showing by a preponderance of the evidence that its permit application is "reasonable, practical, and will adequately protect public safety and promote the public welfare." To facilitate the orderly production of evidence at the hearing, MnDOT shall bear the initial burden of producing evidence to support a *prima facie* case that its application meets the standards set forth in Minn. Stat. § 103G.315, subd. 6. Thereafter, the burden of production will shift to Mayor Beaudet to show that the permit application fails to meet those standards or is contrary to Minnesota statutes or rules in some particular respect. Despite this shifting burden of production, the overall burden of proving that the permit application complies with applicable law and rule shall remain with MnDOT.

MnDNR Approval or Denial of Other Permit Applications

In its Motion in Limine, MnDOT urges that evidence relating to other permit applications that have been made to MnDNR by MnDOT or others and MnDNR's approval or denial of those other permit applications be excluded. MnDOT asserts that the only evidence that should have any influence on the decision regarding the MnDOT permit application at issue in this case are documents and testimony that deal with this particular load testing project. In this regard, MnDOT argues:

> [T]he OAH should only consider evidence that MnDNR would evaluate in deciding whether or not to issue a permit. If the commissioner of MnDNR concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare the commissioners shall grant the permit. Minn. Stat. § 103.315, subd. 3. The OAH is bound by these same considerations.[8]

As to the general proposition advanced by MnDOT, the Administrative Law Judge does not agree that the OAH record must be limited only to information that would be accepted by an agency in connection with a permit application. The rules adopted by the Office of Administrative Hearings include the following provision regarding the admissibility of evidence during contested case hearings:

> The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The judge shall give effect to the rules of privilege recognized by

[8] MnDOT Memorandum in Support of Motion in Limine at 4.

> law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.[9]

During contested case proceedings, the parties are afforded the opportunity to seek the admission of relevant evidence. It is often the case that a broader or more complete record is developed in contested case proceedings than during an agency permitting process, and the final decision maker has the benefit of that record in ensuring that the ultimate result is supported by the facts and law governing the administrative actions at issue. For example, in a case involving a citation issued to a riparian land owner for an unpermitted dock and the landowner's subsequent challenge to that citation as being unsupported by MnDNR's rules, a letter from a MnDNR staffer to a nearby riparian landowner stating that no permit was required for a similar dock was received into the record.[10] Similarly, in the *MCEA v. MPCA* proceeding (cited by MnDOT in the burden of proof discussion, above), evidence related to other permit applications apart from the permit application at issue was received into the contested case record.[11]

It is, however, necessary that documents be shown to be relevant to an issue in this proceeding and otherwise admissible before they will be received into evidence. In his written responses to the motion, Mayor Beaudet has not clearly set forth any reasons why these other permit applications are relevant to the issues involved in the current case. Accordingly, absent a showing of the relevance of each particular document, MnDOT's Motion in Limine is granted as to evidence relating to other permit applications that have been made to MnDNR by MnDOT or others and MnDNR's approval or denial of those other permit applications. It is possible that a reason for accepting some or all of these documents may become apparent during the hearing. As noted during the telephone conference call held on August 9, 2010, Mayor Beaudet is not precluded from demonstrating the relevance of these specific documents at the hearing and offering them into evidence.

Prior MnDOT Testing

MnDOT also seeks in its Motion in Limine to preclude evidence of past MnDOT testing in the St. Croix River or anywhere else. In support of its motion, MnDOT asserts that whether or not MnDOT was previously permitted to conduct testing in the St. Croix River or the results of any such tests are not relevant or admissible in the current proceeding.

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[9] Minn. R. 1400.7300, subp. 1. The rule reflects Minn. Stat. § 14.60, subd. 1, which provides:

> In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.

[10] *In the Matter of the Alteration of a Cross-Section of the St. Croix River by Lee and Genevieve Rossow Without a Permit from the Commissioner of Natural Resources*, OAH Docket No. 7-2000-12019-2 (ALJ Findings of Fact, Conclusions of Law, Recommendation and Memorandum issued May 7, 1999).

[11] *See* Findings 52-59 of ALJ Findings of Fact, Conclusions of Law, Recommendation in *In the Matter of the Saint Cloud Wastewater Treatment Plant NPDES Permit*, OAH Docket No. 7-2200-14439-2 (2004).

The Administrative Law Judge concludes that evidence relating to prior MnDOT applications or permits to conduct testing in the St. Croix River is relevant to the issues set forth in the current case. Accordingly, MnDOT's Motion in Limine regarding this evidence must be denied. However, the Motion in Limine is granted as to MnDOT applications or permits to conduct testing in areas other than the St. Croix River, absent a specific showing of relevance to the permit at issue in this case. Once again, Mayor Beaudet is not precluded from demonstrating the relevance of these specific documents at the hearing and offering them into evidence.

B.L.N.